SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-737

PAUL WEISS,

Petitioner,

- against -

Reverend MICHAEL WALSH, S.J., in his capacity as President of Fordham University; PAUL J. REISS, in his capacity as Vice-President of Academic Affairs of Fordham University; ROBERT ROTH, S.J., in his capacity as Chairman of the Department of Philosophy of Fordham University; EWALD B. NYQUIST, in his capacity as Commissioner of Education of the State of New York; JOSEPH W. McGOVERN, EVERETT J. PENNY, KENNETH B. CLARK, CARL H. PFORZHEIMER, JR., CHARLES W. MILLARD, JR. JOSEPH C. INDELICATO, EDWARD M. WARBURG, MRS. HELEN B. POWER, JOSEPH T. KING, ALEXANDER J. ALLEN, JR., FRANCIS W. McGINLEY, MAX J. RUBIN, THEODORE M. BLACK, STEPHEN K. BAILEY and HAROLD E. NEWCOMB, in their capacities as Regents of the University of the State of New York,

Respondents.

REPLY BRIEF

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the Chair to him may have been his advanced age, it is equally consistent with defendants' contention that Fordham was merely adhering to its regular retirement policy and regulations in effect since 1947, which established a retirement age of 65 years for all members of its faculty, with employment on a half-time basis thereafter being permitted in exceptional cases at the discretion of the Academic Vice President, but in no event to extend beyond the end of the academic year during which the faculty member might attain the age of 70. Weiss was 69 years of age at the time of the September 1970 correspondence. The letters of Fordham's administrators indicate that since 'The Schweitzer Professor is expected to be appointed in accordance with the University's normal faculty policies' and the State would 'assume that an appointee will hold the Chair for an extended period of years', an appointment of Weiss would constitute such a radical departure from Fordham's own university-wide retirement regulations that the State Education Department would refuse to approve it. If these letters, which represent the only evidence before us, were the sole proof offered by Weiss at trial, it would be a far cry from proving discriminatory action on the State's part."

Petitioner amended his complaint in accordance with the order of the District Court and respondents moved for summary judgment after completion of depositions.

As we shall demonstrate below, absolutely nothing was adduced at trial to substantiate petitioner's claim of discriminatory action on the part of the State.

By order dated January 7, 1972 the District Court denied respondents' summary judgment motion. Specifically with regard to the State respondents the District Court narrowly circumscribed the grounds upon which it permitted peti-

tioner to proceed to trial against them:

> "Evidence presently before the Court also establishes that there are genuine issues of material fact with regard to plaintiff's discrimination claim. It is clear that the State does not have an established rule setting age limits for the Schweitzer Chair, and affidavits submitted by *Amici* counsel at an earlier stage of the litigation indicates that one or two recipients of the Chair may have been appointed after attaining the age of 65 (footnote deleted). The written correspondence in this case raises the possibility that the State acquiesced in Fordham's application of an age limitation to plaintiff which was not applied to all candidates for the Chair . . ." (A.19-A.20)*

Respondent clearly contradicted such claims at trial (*infra*) as the District Court below found.

At the conclusion of the non-jury trial below, the Court granted the State respondents' motion to dismiss from the bench:

> "The State of New York has not done any such thing consciously or unconsciously. What the State of New York has been concerned about and solely concerned about and well enough because the Legislature's mandate is clear, that they are going to see that the eminent men wherever possible get the job to assist the department of a university or other institution of higher learning in a particular field and they are not going to be concerned about age and other matters, they are going to leave that up to the normal rules of the university in question. And for those of us who worry about undue intrusion of the Government into educational affairs, I must say, Mr. Weiss, I applaud the Legislature of the State of New York.

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*Unless otherwise indicated, arabic numerals in parentheses preceded by "a" refer to the appendix to the petition.

I.

This Case Presents the Important Constitutional Question of the Illegality of Age Discrimination Squarely for the First Time.

It is difficult to conceive of a case which could raise the issue of age discrimination more directly than this case of Weiss v. Walsh. One defendant admitted that "this [may] constitute discrimination on the basis of age" (A 62). The decision in Weiss v. Walsh, 234 F. Supp. 75 (1971) ruled directly that age discrimination was constitutionally permissible to dismiss part of the complaint. At trial, there was direct testimony that age was, at least, a basis for rejection and withdrawal of offer (Record below, transcript, pp. 179-81; 305-8) and the Trial Judge so found (A 43).

Yet, respondents attempt to suggest that this constitutional issue is foreclosed by claims of fact-finding at a trial in which age discrimination was

specifically excluded from consideration. (See, e.g., Lefkowitz brief, p. 7.) Such suggestions float away to disappear against the slightest breath of judicial scrutiny.

To begin with, this case is in this Court on an appeal from a dismissal of part of the complaint -- the part that states the cause of action of the unconstitutionality of age discrimination. The ruling of the Court was directly on this issue to dismiss. Weiss v. Walsh, supra. On appeal, of course, the question of whether the part dismissed stated a valid cause of action is the question for the reviewing court. Equally certain is it that the allegations pleaded in the dismissed complaint must be taken as true for the motion and for the appeal. See, e.g., Gardner v. Toilet Goods Association, 387 U.S. 167 (1967). "[A]ccepting, as we must on a motion to dismiss on the pleadings, the allegations of the complaint and supporting affidavit as true" at 42. The facts and allegations of

age discrimination were pled and dismissed on the law — the allegations must be accepted as true and the legal basis advanced for dismissal considered.

Next, it should be noted that respondents Walsh, et al. attempt to cloud the facts by quoting the academic Vice-President as saying that he gave age as a reason to withdraw the offer as a device to "cushion the blow" (p. 7). This same individual had written the State Department of Education about Fordham's "commitment" to Paul Weiss, inquiring if "the man's age would...not be...acceptable" (A 58) and in two letters (A 60-1; A 62-3) and in one telephone conversation told Paul Weiss the Schweitzer Chair was his but for the factor of age, speculating that this might be "discrimination on the basis of age" (A 62). After suit, he claimed those statements were falsehoods, knowingly uttered, while admitting he believed age precluded Paul Weiss' appointment (A 85, 91-4). There is no reason to believe that the post-litigation explanation of falsehoods is

more accurate than pre-trial admissions to Petitioner and other defendants.

In a rather curious path of reasoning, respondents Walsh, et al. attempt yet another suggestion - i.e., because there was an adverse ruling on the issue of selective discrimination "it was first necessary for him to prove that he indeed was the victim of age discrimination" (p. 12). Not so. As the Trial Judge clearly indicated in decisions and throughout trial, the only question presented by that claim (formulated by Judicial direction after dismissal) was one of comparison -- were others of Petitioner's chronological age or older given such posts? (In fact, Fordham claimed to be considering a scholar two years Petitioner's junior, and some recipients of fragments of the Chair were in their 70's. Record transcript, p. 221; A 46). Everytime Petitioner tried to raise the issue of age discrimination, he was specifically told it was not allowed in the case. All the court entertained were the questions of comparative age

for hiring. Petitioner, of course, would have put on his full case of age discrimination with his witnesses, as well as defendants' admission, if allowed. All he was permitted to do, however, was list the ages of others — an act which had nothing to do with proving age discrimination for a cause of action already dismissed. The issue as posed by the Trial Judge, the issue which survived Summary Judgment, was that of special, unequal treatment, in fact, rather than exclusion, rejection, and withdrawal of the offer because of age — that matter had been ruled on, was out of the case, considered irrelevant to this claim, and not allowed proof.

It is rare in discrimination cases that defendants admit they discriminated. Here, they do. It is less rare on an appeal from dismissal of an action to have a clear legal question. Here, too, that clear legal question is presented — and Petitioner respectfully requests this Court to consider that most important question of age discrimination.

II.

Age Discrimination is Wrong and Unconstitutional

Respondents Walsh, et al. argue for age discrimination on the claim of legislative wisdom (pp. 17-19). Assuming such claim of wisdom can effect constitutional rights, it is perhaps appropriate to quote President Richard Nixon's words on the issue in his radio broadcast about H. R. I.:

> "We hear a lot about generation gaps these days. We cannot afford a generation gap which shuts out the young in this country. But neither can we afford a generation gap that shuts out the old.
>
> And so we must develop a new attitude toward aging in America, one that stops regarding older Americans as a burden and starts regarding them as a resource.
>
> Senior power can be a tremendous source of energy for our country. Churchill was a great leader at 81. Holmes was a great jurist at 91. Clara Barton led the Red Cross

> at 83 and Connie Mack led the Athletics at 88. Michelangelo was painting at 89; Toscanini was conducting at 87. And for every celebrated name like these, there are millions of ordinary citizens in their 70's and 80's who are making extraordinary contributions to their communities.
>
> Senator Green of Rhode Island used to contend: 'Most people say that as you get old you have to give up things. I think you get old because you give up things.'
>
> I believe that millions of older Americans can make great contributions to our nation's progress if only they have the chance. This really is the point of our Government programs and policies -- to help older Americans play a full, continuing role in the great adventures of America."

Petitioner agrees with the President and hopes this Court will too.

Respondents Walsh, et al. claim because employment is at stake, there can be no assertion of constitutional rights (pp. 14-15). But, see Petitioner's Petition for Certiorari, pp. 29-30. See also Traux v. Raich, 239 U.S. 33 (1915) "[T]he right to work for a living...is of the very essence of the personal

freedom and opportunity that it was the purpose of the amendment to secure" at 41; see also, Schware v. Board of Bar Examiners, 353 U.S. 232 (1967); Slochower v. Board of Higher Education, 350 U.S. 551 (1950) "[c]onstitutional protection does extend to the public servant whose exclusion [from employment] is patently arbitrary or discriminatory." Wieman v. Updegraff, 344 U.S. 183 (1952) at 192. See, historically, Butchers Union v. Crescent City, 111 U.S. 746 (1884) (concurring opinion of Justice Bradley; Dent v. West Virginia, 129 U.S. 114 (1889), particularly at 121. See in addition to cases cited in Petition for Certiorari, pp. 29-30 and footnote 5 there) for proposition that employment may not be refused or terminated by unconstitutional means or for unconstitutional motives, Cohen v. Chesterfield County School Board, 326 F. Supp. 1159 (1971); Eslinger v. Thomas, 340 F. Supp. 886 (D. S.C. 1972). This defense is defenseless as well as senseless.

Finally, respondent State officials argue they did nothing wrong (see Lefkowitz, e.g., pp. 6-7). But they acquiesced to discrimination and will give money for its use. That is clearly forbidden as wrong by many decisions. See, e.g., Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Derrington v. Plummer, 240 F.2d 922 (5th; 1956) cert. denied 353 U.S. 924 (1957); U.S. v. Price, 383 U.S. 787 (1966); Hammond v. University of Tampa, 344 F.2d 951 (5th; 1965). The State must not allow its funds to be used in a discriminatory manner or they commit an actionable wrong. (It should be noted the Trial Judge prevented any attempt to prove this type of complicity, Record transcript, p. 298).

Petitioner and the issue of age discrimination are before this Court. Past precedent, justice, and common sense require a hearing. Petitioner respectfully requests that hearing.

CONCLUSION

For the reasons set forth above and in the Petition filed herein, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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